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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of HARRY V. and
DALILA A. ATHERLEY.

B211712

(Los Angeles County
Super. Ct. No. VD059568)

HARRY VAUGHN ATHERLEY,

Respondent,

v.

DALILA ARACELI ATHERLEY,

Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County,
Robert B. Axel, Commissioner. Affirmed.

Law Offices of Richard N. Deyo and Richard N. Deyo for Appellant.

Artiano & Associates, James Artiano and Eric M. Nakasu for Respondent.

INTRODUCTION

Dalila Araceli Atherley appeals from an award of spousal support in a judgment of dissolution of her marriage to Harry Vaughn Atherley. We find that the trial court considered the required statutory circumstances in Family Code section 4320,¹ and find there was no abuse of discretion in the spousal support award. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Dalila and Harry Atherley² were married on December 10, 1975 and separated on September 26, 2005. At separation they had no minor children. Harry filed a petition for dissolution on October 11, 2005. The parties executed a marital settlement agreement, in which they agreed that the trial court would determine the support of the parties.

The marital settlement agreement stated that Harry was in good health, was employed by Sun Chemical Corporation, and earned 81,584 per year before taxes. Dalila was in poor health and as a homemaker earned no income.

On May 5, 2008, Dalila, age 54 years, filed an income and expense declaration stating that she had been unemployed since 2003. She had a ninth-grade education. She received spousal support of \$1,100. Dalila listed her proposed monthly expenses as \$2,823.75. At trial Dalila had admitted into evidence a document from a health care provider, dated November 17, 2005, stating she had been followed in the Orthopedics Department of the Kaiser Permanente Bellflower Medical Center for “bilateral knee osteoarthritis, osteoarthritis of her hips, and bilateral greater trochanteric bursitis. Due to her conditions, she is not suitable for work that requires prolonged standing, walking, lifting, stair climbing, and even prolonged sitting. She is currently under our care and will continue to stay under our care.”

¹ Unless otherwise specified, statutes in this opinion will refer to the Family Code.

² Because the parties share the same surname, for clarity and ease of reference this opinion will refer to them by their first names. We mean no disrespect. (*In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 1304, fn 1.)

Dalila testified that after marrying Harry, she worked as a seamstress before giving birth to her first child, and for about six months thereafter. Harry then told her he did not want her to work so she never worked. She had three more children within four years, and stayed home to care for the children. She had no other employment until 2003, when her stepmother died and her grandmother moved in with her. After her grandmother's leg was amputated, she earned \$7.50 per hour for five hours a day caring for her grandmother, which was her income for approximately three years. Presently arthritis caused pain in her hip and in her fingers and affected her ability to use her hands and fingers to work as a seamstress. Dalila testified that presently she received \$1,100 per month from Harry, who also paid the mortgage and utility bills on their Santa Fe Springs house where she lived two of her adult sons who, although employed, paid no rent. The marital settlement agreement awarded ownership of the Santa Fe Springs house to Dalila and Harry as joint tenants in common; it was to be listed for sale and net proceeds to be divided equally, except for a \$31,922 equalizing payment by Harry from his share to Dalila.

Dalila was awarded two properties in Belize, but said she did not want to live in Belize and wanted to stay in California. She estimated her living expenses after the sale of the Santa Fe Springs house as \$2,823.75 a month.

Harry, age 53 years, submitted an income and expense declaration stating that he had a high school education, had been employed since 1981, and he worked as an ink technician for Sun Chemical in Santa Fe Springs. He stated an average monthly income of \$6,183, and total monthly expenses of \$5,066. Harry latest payroll check stated that as of April 24, 2008, his year to date gross pay (before taxes and deductions) was \$28,952.68. His gross annual income was \$66,165 plus overtime. He believed that requiring him to pay \$1,100 spousal support to Dalila was sufficient, because she would have more than \$450,000 in assets after settlement of her properties in Belize and of community property in California. At present, Harry testified that he had to borrow to help with expenses, because he paid more than \$6,000 in monthly expenses and his

monthly take home pay was a little over \$4,800, leaving a deficit of approximately \$1,200.

The judgment of dissolution filed on August 18, 2008, ordered that community and separate property be awarded pursuant to the parties' written stipulation. As to spousal support, the judgment ordered that the current orders regarding Harry's obligation to pay spousal support and maintain payments on the family residence were to remain in effect until the sale of the residence, and after that sale ordered Harry to pay Dalila monthly spousal support of \$1,200, continuing until either party's death, Dalila's remarriage, 13½ years, or further order of the court, whichever occurred first; and commencing 13½ years after the first installment was due, that sum should be reduced \$50 a month and should thereafter be reduced an additional \$50 per month for each additional year that payment was due.

Dalila filed a timely notice of appeal from that part of the judgment setting forth the spousal support award.

ISSUE

Dalila claims that the trial court abused its discretion in ordering monthly spousal support of \$1,200, given uncontradicted evidence that she was in poor health and due to her conditions was not capable of work that required prolonged standing, walking, lifting, stair climbing, or sitting, that she had no employment for the previous 25 years and a ninth-grade education, and that Harry earned between \$6,800 and \$7,700 per month.

DISCUSSION

Dalila claims on appeal that the trial court's spousal support award abused its discretion because the trial court failed to consider the factors in section 4320, did not give proper consideration to her educational level and meager employment history during the marriage, and ignored evidence indicating that she was unable to work.

1. *Dalila's Failure to Request a Statement of Decision on Spousal Support
Waived the Requirement of That Statement of Decision and Allows This Court
to Imply Findings to Support the Judgment*

Code of Civil Procedure section 632 applies where there has been a trial followed by a judgment. (*In re Marriage of Askmo* (2000) 85 Cal.App.4th 1032, 1040.) Code of Civil Procedure section 632 states that upon any party's request, the trial court shall issue a statement of decision explaining the factual and legal basis for its decision as to the principal controverted issues at trial. Here Dalila made neither a written nor oral request for a statement of decision in this trial.

A party who makes no timely request for a statement of decision waives the requirement of such a statement (*In re Marriage of Jeffries* (1991) 228 Cal.App.3d 548, 554, fn 4) and this court indulges the presumption in favor of the correctness of the judgment and implies findings to support that judgment (*ibid.*; *In re Marriage of Weinstein* (1991) 4 Cal.App.4th 555, 570). Our review is limited to whether the record contains substantial evidence to support the implied findings. (*In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 928.)

2. *Standard of Review of a Spousal Support Award*

"Spousal support is governed by statute. (See §§ 4300-4360.) In ordering spousal support, the trial court *must* consider and weigh all of the circumstances enumerated in [section 4320], to the extent they are relevant to the case before it." (*In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 302.)

" 'In making its spousal support order, the trial court possesses broad discretion so as to fairly exercise the weighing process contemplated by section 4320, with the goal of accomplishing substantial justice for the parties in the case before it.' [Citation.] In balancing the applicable statutory factors, the trial court has discretion to determine the appropriate weight to accord to each. [Citation.] But the 'court may not be arbitrary; it must exercise its discretion along legal lines, taking into consideration the applicable circumstances of the parties set forth in [the statute], especially reasonable needs and their financial abilities.' [Citation.] Furthermore, the court does not have discretion to

ignore any relevant circumstance enumerated in the statute. To the contrary, the trial judge must both recognize and *apply* each applicable statutory factor in setting spousal support. [Citations.] Failure to do so is reversible error. [Citations.]” (*In re Marriage of Cheriton*, *supra*, 92 Cal.App.4th at p. 304.)

Although the trial court must consider the section 4320 guidelines, its ultimate decision rests within the trial court’s broad discretion, the exercise of which will not be disturbed on appeal unless an abuse of discretion is shown as a matter of law: where, considering all relevant circumstances, the court exceeded the bounds of reason or it can be fairly said that no judge would reasonably make the same order. (*In re Marriage of Huntington* (1992) 10 Cal.App.4th 1513, 1521.)

3. *The Support Award Was Not an Abuse of Discretion*

Dalila claims the trial failed to consider circumstances required by section 4320.

Section 4320 states:

“In ordering spousal support under this part, the court shall consider all of the following circumstances:

“(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:

“(1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

“(2) The extent to which the supported party’s present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

“[¶] . . . [¶]³

“(c) The ability of the supporting party to pay spousal support, taking into account the supporting party’s earning capacity, earned and unearned income, assets, and standard of living.

“(d) The needs of each party based on the standard of living established during the marriage.

“(e) The obligations and assets, including the separate property, of each party.

“(f) The duration of the marriage.

“[¶] . . . [¶]

“(h) The age and health of the parties.

“[¶] . . . [¶]

“(j) The immediate and specific tax consequences to each party.

“(k) The balance of the hardships to each party.

“(l) The goal that the supported party shall be self-supporting within a reasonable period of time. Except in the case of a marriage of long duration as described in Section 4336, a ‘reasonable period of time’ for purposes of this section generally shall be one-half the length of the marriage. However, nothing in this section is intended to limit the court’s discretion to order support for a greater or lesser length of time, based on any of the other factors listed in this section, Section 4336, and the circumstances of the parties.

“[¶] . . . [¶]

“(n) Any other factors the court determines are just and equitable.”

³ The quotation of section 4320 omits the subdivisions representing circumstances not present in this case: (b) [“The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.”]; (g) [“The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.”]; (i) [“Documented evidence of any history of domestic violence . . . between the parties”]; (m) [“The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325.”].

In giving its ruling at the conclusion of the May 5, 2009, hearing, the trial court expressly stated that it was evaluating the section 4320 criteria. With respect to section 4320, subdivision (a)(1), the trial court found that although Dalila did not have extensive marketable skills, but did have the ability to earn. While recognizing Dalila's health problems, the trial court found that Dalila had the ability to earn money and that her ailments did not preclude her from earning income. The trial court noted Dalila's experience in earning income from caregiving, and stated that the trial court did not consider Dalila totally disabled for purposes of earning an income. The trial court attributed to Dalila the amount of income which she earned previously as a caregiver, approximately \$700 a month. Pursuant to subdivision (a)(2), the trial court considered the period Dalila spent as a homemaker raising four children, during which time she was not in the labor market. The trial court considered the extent the parties' earning capacity was sufficient to maintain the standard of living established during the marriage, which it called "not a high income earner lifestyle" but instead a "normal lifestyle."

Pursuant to subdivision (c), the trial court noted the parties' marital settlement agreement which stated that Harry earned approximately \$81,584 per year before taxes. Pursuant to section 4320, subdivision (d), the trial court considered the parties' income and expense declarations, and found those to be relatively reasonable based on the parties' lifestyles. Pursuant to subdivision (f) and (h), the trial court considered the duration of the marriage and the parties' age. Pursuant to subdivision (e), the trial court considered Dalila's two properties in Belize and the assets obtained as a result of the marital dissolution and the income attributed to those items. The trial court attributed four percent income from those assets, and stated that would provide additional income to Dalila for her living expenses. Pursuant to subdivision (f), the trial considered the parties' 27-year marriage. Pursuant to subdivision (h), the trial considered Dalila's health problems, but found her nonetheless able to earn income as a part-time caregiver and attributed \$700 monthly income to that occupation. Pursuant to subdivision (k), the trial court balanced the hardships to each party, and stated that Harry had maintained a strenuous burden in maintaining mortgage payments on the community property house

and providing \$1100 per month support for two years. Pursuant to subdivision (j), the trial court considered tax consequences from the sale of the community property house and its consequences on net income. Pursuant to subdivision (l), the trial court considered the goal that the supported party be self-supporting within a reasonable time.

The trial court did consider the section 4320 circumstances it was required to consider in making the spousal support award. Dalila has not shown that the spousal support was an abuse of discretion as a matter of law, and we find no abuse of discretion in that award.

4. *Purported Clerical Error in Judgment Can Be Corrected by a Motion in the Trial Court Pursuant to Code of Civil Procedure Section 437, Subdivision (d)*

Harry claims that the trial court's judgment of dissolution incorrectly set forth the terms of the spousal support ruling made by the trial court in the May 5, 2009, hearing.

In the May 5, 2009, hearing, the trial court stated, as to reducing spousal support after 13½ years: "We'll trail off the \$1200 a month at the rate of \$50 a month for the number of months necessary until we go down to zero." Dalila's counsel asked: "You said \$50 a month. So after thirteen and a half years, it's 1150, then 1100, then 1050, is that what you intended?" The trial court responded "Right."

By contrast, the judgment filed on August 18, 2008, stated: "Commencing thirteen and one-half years after the first installment is due, said sum shall be reduced \$50.00 a month and shall thereafter be reduced an additional \$50.000 per month for each additional year that said payment is due."

Although Dalila's counsel prepared the judgment, Harry's counsel approved it as to form and content. A trial court's oral ruling does not become effective until it is filed in writing and the trial court may properly file a written order differing from its oral ruling. Moreover, when the trial court expressly indicates that a written judgment will be filed, the written judgment is the effective order. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1170.) The finality of the written judgment notwithstanding, a court has inherent and statutory power, after final judgment and regardless of lapse of time, to correct clerical errors, whether made by the clerk, counsel, or the trial judge, so

that the judgment will conform to the order directed. (Code. Civ. Proc., § 473(d).) When a signed judgment does not reflect the court's expressed judicial intention, signing of the judgment involves clerical rather than judicial error. (*In re Marriage of Kaufman* (1980) 101 Cal.App.3d 147, 151.) Counsels' failure to record correctly the terms of a court-ordered judgment constitutes clerical error. (*Ibid.*) Such clerical error is correctable at any time (*ibid.*), even after affirmance of the judgment on appeal. (*Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 506.) Harry's remedy is a motion in the trial court to correct or amend clerical error in the judgment pursuant to Code of Civil Procedure section 473, subdivision (d).

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondent Harry Vaughn Atherley.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.